

**MAINE WATER QUALITY STANDARDS LITIGATION &
DEPARTMENT OF THE INTERIOR CLARIFICATION LETTER
BRIEFING FOR DAVID FOTOUHI
MAY 17, 2018**

OUTLINE OF BRIEFING:

- **OVERVIEW OF DOI'S 2015 OPINION LETTER**
- **KEY POINTS OF DOI'S 2018 CLARIFICATION LETTER & LITIGATION IMPACTS**
- **RECOMMENDED APPROACH TO ADDRESSING THE 2018 LETTER IN THE LITIGATION**

OVERVIEW OF DOI'S 2015 OPINION LETTER

- As part of EPA's review of Maine's WQS as applied to tribal waters, EPA sought an opinion from DOI's Office of the Solicitor on the protection of tribal sustenance fishing under the applicable state and federal settlement acts and the relationship between tribal sustenance fishing in Maine and water quality.
- In a January 2015 Letter (2015 Opinion), DOI concluded that all four tribes in Maine have "federally-protected tribal fishing rights." The source of the fishing rights and the extent of permissible state regulation of such rights varies from tribe to tribe.
- DOI provided a survey of case law in which courts held that tribal fishing rights encompass subsidiary rights necessary to render the rights meaningful. Based on this analysis, DOI concluded that "fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right."
- DOI concluded that the fishing rights of the tribes in Maine "would be rendered meaningless if they did not also imply a right to water quality of a sufficient level to keep the fish edible so that tribal members can safely take the fish for their sustenance."
- In the February 2015 decision on Maine's WQS, EPA noted that DOI is the federal government's expert agency on matters of Indian law and charged with administering the settlement acts in Maine. EPA cited to, and relied on, DOI's 2015 Opinion in various sections of the WQS decision. Although our decision never conflicted with DOI's views, we did (as described below) take a different approach to certain issues.

KEY POINTS OF DOI'S 2018 CLARIFICATION LETTER & LITIGATION IMPACTS

1. Procedural Issue: On April 27, 2018, DOI provided EPA with a "clarification" letter (2018 Letter) providing "further analysis of the issues discussed in the Solicitor's 2015 Letter."

- Litigation Impacts: Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

2. Southern Tribes: Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- 2015 Opinion on this point: Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- EPA's 2015 Decision on this point: Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- What does the 2018 Letter change, if anything: Ex. 5 ACP / AWP / DPP

- Litigation Impacts: Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

3. Northern Tribes: Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- 2015 Opinion on this point:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- EPA's 2015 Decision on this point:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- What does the 2018 Letter change, if anything:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- Litigation Impacts:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

4. Wabanaki Study:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- 2015 Opinion on this point:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- EPA's 2015 Decision on this point:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- What does the 2018 Letter change, if anything:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- Litigation Impacts:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

5. Definition of "Sustenance":

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- 2015 Opinion on this point:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- EPA's 2015 Decision on this point:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- What does the 2018 Letter change, if anything:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

- Litigation Impacts:

Ex. 5 ACP / AWP / DPP

Ex. 5 ACP / AWP / DPP

RECOMMENDED APPROACH TO ADDRESSING THE 2018 LETTER IN THE LITIGATION

Ex. 5 ACP / AWP / DPP

